Supreme Court, U.S.
FILED
JUL 31 1992
OFFICE OF THE CLERK

No. 91-1618

In the Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE VOINOVICH, GOVERNOR OF OHIO, ET AL.,
APPELLANTS

v.

BARNEY QUILTER, SPEAKER PRO TEMPORE OF THE
OHIO HOUSE OF REPRESENTATIVES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

JAMES P. TURNER
Deputy Assistant Attorney General

THOMAS G. HUNGAR
Assistant to the Solicitor General

DAVID K. FLYNN
MARK L. GROSS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in holding that the State of Ohio violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, by adopting a legislative redistricting plan that created majority-minority electoral districts despite the absence of proof that creation of such districts was required in order to remedy a violation of the Voting Rights Act.

2. Whether the district court erred in holding that the State of Ohio's legislative redistricting plan intentionally fragmented minority voting concentrations in violation of the Fifteenth Amendment.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	9
Argument	12
I. The district court erred in holding that the apportionment board's creation of majority-black districts resulted in dilution of black votes in violation of Section 2 of the Voting Rights Act	12
II. The district court erred in holding that the apportionment board's creation of majority-black districts violated the Fifteenth Amendment	17
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Armour v. *Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991)	8
Beer v. *United States*, 425 U.S. 130 (1976)	17
Brewer v. *Ham*, 876 F.2d 448 (5th Cir. 1989)	16
Buchanan v. *City of Jackson*, 708 F.2d 1066 (6th Cir. 1983)	17
City of Mobile v. *Bolden*, 446 U.S. 55 (1980)	10, 11, 17, 18, 19
Connor v. *Finch*, 431 U.S. 407 (1977)	13
Ewing v. *Monroe County*, 740 F. Supp. 417 (N.D. Miss. 1990)	16
Garza v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991)	18
Gingles v. *Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), aff'd in part and rev'd in part, 478 U.S. 30 (1986)	16
Growe v. *Emison* prob. juris. noted, No. 91-1420 (Mar. 30, 1992)	2, 14

Cases—Continued: Page

Gunn v. *Chickasaw County*, 705 F. Supp. 315 (N.D. Miss. 1989) 16
Hastert v. *State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) 16
Houston Lawyers' Ass'n v. *Attorney General*, 111 S. Ct. 2376 (1991) 2
Jeffers v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) 16
Latino Political Action Comm., Inc. v. *City of Boston*, 784 F.2d 409 (1st Cir. 1986) 16
Lodge v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981) 17
McDaniels v. *Mehfoud*, 702 F. Supp. 588 (E.D. Va. 1988) 16
McMillan v. *Escambia County*, 638 F.2d 1239 (5th Cir.), cert. dismissed, 453 U.S. 946 (1981), vacated in part, 688 F.2d 960 (5th Cir. 1982) 17
McNeil v. *Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989) 16
Neal v. *Coleburn*, 689 F. Supp. 1426 (E.D. Va. 1988) 16
Overton v. *City of Austin*, 871 F.2d 529 (5th Cir. 1989) 15
Perkins v. *City of West Helena*, 675 F.2d 201 (8th Cir.), aff'd, 459 U.S. 801 (1982) 17
Personnel Administrator v. *Feeney*, 442 U.S. 256 (1979) 11, 19
Richards v. *Terrazas*:
112 S. Ct. 1556 (1992) 2
112 S. Ct. 2272 (1992) 2
Rogers v. *Lodge*, 458 U.S. 613 (1982) 17
Sanchez v. *Bond*:
493 U.S. 916 (1989) 2
875 F.2d 1488 (10th Cir. 1989), cert. denied, 111 S. Ct. 340 (1990) 2, 15
Skorepa v. *City of Chula Vista*, 723 F. Supp. 1384 (S.D. Cal. 1989) 16
Thornburg v. *Gingles*, 478 U.S. 30 (1986) 2, 4-5, 10, 14, 16

Cases—Continued: Page

Turner v. *Arkansas*, 784 F. Supp. 553 (E.D. Ark. 1991), aff'd, 112 S. Ct. 2296 (1992) 16
United States v. *Marengo County Comm'n*, 731 F.2d 1546 (11th Cir.), appeal dismissed, 469 U.S. 976 (1984) 17
Voinovich v. *Ferguson*, 586 N.E.2d 1020 (Ohio 1992) 4
Voinovich v. *Quilter*, 112 S. Ct. 1663 (1992) 9
Washington v. *Finlay*, 664 F.2d 913 (4th Cir. 1981) 17
Wise v. *Lipscomb*, 437 U.S. 535 (1978) 13

Statutes and regulation:

U.S. Const.:
Amend. XIV (Equal Protection Clause) 4, 18
Amend. XV 1, 4, 6, 8, 9, 10, 17, 18
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:
§ 2, 42 U.S.C. 1973 ..... 1, 4, 7, 8, 9, 10, 12, 13, 14, 15, 16, 18
§ 5, 42 U.S.C. 1973c 1, 13
Ohio Const.:
Art. II, § 1 2
Art. XI, § 1 2
28 C.F.R. 51.55(a) 1

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1618

GEORGE VOINOVICH, GOVERNOR OF OHIO, ET AL.,
APPELLANTS

v.

BARNEY QUILTER, SPEAKER PRO TEMPORE OF THE
OHIO HOUSE OF REPRESENTATIVES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

INTEREST OF THE UNITED STATES

This case involves claims that the State of Ohio's legislative reapportionment plan violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The United States has the primary responsibility for enforcing Section 2. Moreover, in exercising his preclearance authority under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, the Attorney General considers whether a proposed change in election laws violates the requirements of the Fifteenth Amendment. 28 C.F.R. 51.55(a). Thus, the decision of the Court in this case

will have an important effect on federal enforcement efforts. In addition, the United States has participated either as a party or as an amicus curiae in many of the Court's previous voting rights cases, and it has also responded to requests from the Court concerning whether certiorari should be granted in such cases. See, *e.g.*, *Growe* v. *Emison*, probable jurisdiction noted, No. 91-1420 (Mar. 30, 1992); *Richards* v. *Terrazas*, 112 S. Ct. 1556, 112 S. Ct. 2272 (1992); *Houston Lawyers' Ass'n* v. *Attorney General*, 111 S. Ct. 2376 (1991); *Sanchez* v. *Bond*, 493 U.S. 916 (1989), 111 S. Ct. 310 (1990); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

STATEMENT

1. The General Assembly of the State of Ohio consists of a House of Representatives and a Senate. Ohio Const., art. II, § 1. The House of Representatives has 99 members elected from single-member electoral districts. Ohio Const., art. XI, § 1. The Ohio Constitution requires the State's apportionment board to reapportion the electoral districts for the state House of Representatives every ten years. *Ibid.*

In August 1991, the state apportionment board convened to conduct the decennial reapportionment of the General Assembly pursuant to the state constitutional mandate. The board consisted of Governor George Voinovich, state Auditor Thomas Ferguson, Secretary of State Robert Taft, state Senator Stanley Aronoff, and state Representative Barney Quilter. J.S. App. 1a-2a, 50a. James Tilling, the chief executive of the Ohio Senate, was selected by the majority of the apportionment board to draft a new apportionment plan. *Id.* at 52a. Tilling held 14 public hearings around Ohio in the summer of 1991 to receive public

comment on the reapportionment process. *Id.* at 6a. At many of those hearings, Tilling told the audiences that he understood the Voting Rights Act to require the State to consider "the totality of the circumstances in each urban area" and to create, where possible, legislative districts in which minority voters constituted a voting majority. *Ibid.* Members of minority groups spoke at many of the hearings. *Ibid.*

After the hearings were concluded, Tilling drafted his proposed reapportionment plan, which he submitted to the apportionment board on September 26, 1991. The board adopted Tilling's plan, with minor amendments, on October 3, 1991, by a three-to-two party-line vote. J.S. App. 6a, 50a. That plan (the "1991 plan") created eight House of Representatives electoral districts in which blacks constituted a majority of the voting age population (VAP), with black VAP ranging from 50.30 percent to 65.13 percent. *Id.* at 114a, 183a-185a. Blacks constituted at least ten percent of the VAP in a total of 20 districts under the 1991 plan. *Ibid.* The plan proposed by appellees Quilter and Ferguson, which was rejected by the board, would have created six majority-black districts (with black VAP ranging from 50.60 percent to 67.08 percent) and a total of 20 districts in which blacks constituted at least ten percent of the VAP. *Id.* at 114a, 183a-185a. The preexisting 1981 apportionment plan had created only four majority-black districts, and a total of 26 districts in which blacks constituted at least ten percent of the VAP. *Id.* at 96a-98a, 177a-178a.[1]

---

[1] Six counties in Ohio—Cuyahoga, Franklin, Hamilton, Montgomery, Summit, and Lucas—have significant minority populations; all of the State's majority-black districts are located in those counties. Under the 1981 reapportionment

On November 1, 1991, appellees filed a class action in the United States District Court for the Northern District of Ohio alleging that the 1991 plan unnecessarily packed black voters into electoral districts and fragmented other concentrations of black voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the Fifteenth Amendment to the United States Constitution. Appellees also alleged that the 1991 plan amounted to unconstitutional political gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment.[2] Appellees requested an order enjoining implementation of the 1991 plan. Compl. at 9-23, in *Quilter* v. *Voinovich*, No. 91CV-2219.

2. On January 31, 1992, the three-judge district court ordered the apportionment board to reconsider the 1991 plan. J.S. App. 1a-16a. The court first rejected the notion that Section 2 of the Voting Rights Act mandates the drawing of majority-minority districts, observing that nothing in the language of the statute creates such a requirement. J.S. App. 8a-10a. Moreover, the court held that the first precondition to vote-dilution claims set forth in *Thornburg* v.

---

plan, those six counties were divided into 43 electoral districts. Eleven black representatives (over 25 percent of the total delegation from those counties) were elected from those 43 districts in the 1990 election. J.S. App. 22a-23a, 58a-62a. Blacks make up about 20 percent of the population of the six counties. J.S. App. 23a. Based on 1981 figures, the districts that elected black representatives had black populations ranging from 35.4 percent to 94.6 percent. J.S. App. 115a.

[2] Appellees also claimed that the 1991 plan violated the Ohio Constitution. In *Voinovich* v *Ferguson*, 586 N.E.2d 1020 (1992), however, the Ohio Supreme Court ruled that the 1991 plan, with minor technical corrections, complied with applicable state law.

Gingles, 478 U.S. 30 (1986)—namely, the requirement that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50—was "not applicable to the apportionment of single-member districts and claims of dilution of minority influence districts at issue here." J.S. App. 10a.

The court further held that the apportionment board's "wholesale creation of majority-minority districts" could not be justified under the Voting Rights Act unless the board had first properly demonstrated the existence of a violation of that Act. J.S. App. 14a. The court found that Tilling and the board had failed to demonstrate the existence of such a violation, because "[t]he finding of a violation requires an in-depth analysis of the totality of the circumstances in the locality at issue" (*id.* at 11a), and no such analysis had been conducted. In particular, Tilling's conclusion that significant racial bloc voting existed in Ohio was not properly supported by written findings and regression analysis (*id.* at 12a-13a), and thus "d[id] not rise to the level of proof of racially polarized voting." *Id.* at 13a.

Likewise, Tilling's conclusions concerning social and historical factors and the unresponsiveness of elected officials to the concerns of the minority community were not probative, according to the district court, because Tilling had failed to conduct the requisite " 'searching practical evaluation of past and present reality' mandated by the legislative history" of the Voting Rights Act. J.S. App. 13a-14a. Accordingly, the district court ordered the board to conduct such an examination of the "totality of the circumstances" in order to justify its otherwise invalid decision to create majority-minority districts.

Id. at 14a. In the alternative, the board was instructed to submit a revised plan to the court for its approval. *Id.* at 14a-15a.

Judge Dowd dissented. J.S. App. 17a-117a. He criticized the majority for failing to provide "detailed findings of facts" (*id.* at 20a), and set forth an exhaustive listing of the facts relevant to a proper disposition of the case. *Id.* at 21a-29a, 40a-117a. Moreover, he found the majority's legal analysis to be flawed. *Id.* at 31a-35a. He rejected the majority's conclusion that the State was required to prove a Voting Rights Act violation before it could create a majority-black district, noting that "[t]his argument places the cart before the horse." *Id.* at 31a. Instead, Judge Dowd argued that "[i]t is only when the creation of majority-minority districts serves to dilute the minority vote that the Voting Rights Act is violated," and concluded that the record in this case did not support such a claim. *Id.* at 32a.

In addition, he observed that the majority's refusal to permit the State to increase the black population in any district which had already elected a black representative effectively required, contrary to the Voting Rights Act, that the minority's voting strength be maximized. J.S. App. 35a. Finally, he noted that "it is difficult to find that there has been impermissible minority vote dilution in Ohio" given the fact that "blacks have been able to consistently elect more representatives in the six major urban counties than their percentage of the population would suggest." *Ibid.*

Judge Dowd also found that no Fifteenth Amendment violation had been shown, because appellees had failed to prove that the board harbored any discriminatory intent in creating the 1991 plan (J.S. App. 36a-37a); instead, the board considered race solely

for the purpose of avoiding any violation of the Voting Rights Act, and if anything its "consideration of race served to enhance the black vote." *Id.* at 37a.

3. The apportionment board responded to the district court's order by submitting information intended to show that the "totality of the circumstances" in Ohio closely approximated the evidence needed to prove a Section 2 case. The board also revised the 1991 plan, adopting "Amendment D" in order to correct "technical" errors that had been identified by the Ohio Supreme Court in its independent review of the plan. J.S. App. 258a-259a; J.A. 334, 337. The revised plan (the "1992 plan") created five majority-black districts. J.S. App. 258a-263a.[3]

4. On March 10, 1992, the district court invalidated the corrected 1992 plan. J.S. App. 118a-121a. The court found that the board had failed to proffer sufficient evidence to prove a violation of the Voting Rights Act so as to justify the board's creation of majority-black districts. *Id.* at 119a. According to the court, "the Board fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Ibid.* In addition, the court held that the 1992 plan was invalid under the Fifteenth Amendment. *Ibid.* Accordingly, the court enjoined enforcement of the 1992 plan and appointed a special master to prepare an "acceptable" apportionment plan. *Id.* at 119a-120a.

---

[3] The 1992 plan also created a total of 13 districts with a black VAP of at least 35 percent. J.S. App. 260a-263a. The 1991 plan and the plan originally proposed by the board minority each would have created 12 such districts (*ibid.*), and the 1981 plan had provided for nine such districts. *Id.* at 96a-98a. According to the district court, "black candidates have been repeatedly elected from districts with only a 35% black population." *Id.* at 141a.

Judge Dowd again dissented. J.S. App. 122a-126a. Judge Dowd found that the apportionment board had submitted "an exhaustive set of fact findings" that sufficed to justify its creation of majority-minority districts. *Id.* at 122a.

On March 19, 1992, the district court majority issued a further order (J.S. App. 127a-148a) to "more fully develop" the majority's earlier findings and conclusions. *Id.* at 128a. The court observed that "[b]oth *Gingles* and the Senate Report [accompanying the 1982 amendment to Section 2] state that violations of the Voting Rights Act must be proven, not assumed, as a predicate for remedial action." *Id.* at 129a. Accordingly, the court reaffirmed its previous holding that the apportionment board was required to demonstrate the existence of a Voting Rights Act violation before it could be permitted to create majority-minority districts. *Id.* at 128a-140a.

The court again found that the board had failed to establish the prerequisites to a Section 2 violation. In particular, the court found that "legally significant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice." J.S. App. 132a.[4] Indeed, the court accused the board of "ignor[ing] three critical facts: the absence of racial bloc voting, the fact that black voters have been able to elect both black and white candidates of their choice, and the fact that such

---

[4] The only exception to this finding involved two districts in Mahoning County, which the court in *Armour* v. *Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), had previously found violative of Section 2 and the Fifteenth Amendment. J.S. App. 132a. Those districts were redistricted in accordance with the *Armour* court's ruling (*id.* at 183a), and were not challenged by appellees in this case.

candidates have been elected over a sustained period of time." *Id.* at 130a; see also *id.* at 139a-140a.

The court then rejected appellants' argument that the court's own finding of a Section 2 violation was flawed by its failure to evaluate the totality of the circumstances. J.S. App. 141a-142a. Noting that "[t]he totality of circumstances reveals coalitional voting between whites and blacks," and that "black candidates have been repeatedly elected from districts with only a 35% black population," the court found that the apportionment board's "per se requirement of the creation of majority-minority districts has a dilutive effect on black votes—exactly what [appellants] intended." *Id.* at 141a-142a. The court further held that the board had violated the Fifteenth Amendment by intentionally creating majority-minority districts for "political advantage," asserting that "[i]t is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim." *Id.* at 142a-143a.

On March 31, 1992, the district court ordered that the primary elections for the Ohio General Assembly be rescheduled to September 8, 1992. J.S. App. 324a. On April 20, 1992, this Court stayed the district court's orders of March 10, March 17, and March 31, 1992. *Voinovich* v. *Quilter*, 112 S. Ct. 1663.

SUMMARY OF ARGUMENT

I. The district court erred in suggesting that Section 2 of the Voting Rights Act automatically forbids the States to create majority-minority electoral districts in the absence of a proven violation of the Act. Within the confines of federal law, the States are free to select whatever redistricting criteria they wish. To be sure, the creation of majority-minority districts

could under some circumstances result in vote dilution in violation of Section 2, but such a violation must be proved under the same standards applicable to all vote-dilution claims under Section 2.

In our view, the three threshold preconditions set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), apply to claims that single-member districts have been drawn in a manner that dilutes the voting power of a particular minority group. Under *Gingles*, a plaintiff group must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 48-51.

Considered in light of the *Gingles* preconditions, the district court's factual findings compel rejection of the Section 2 vote-dilution claim in this case. The district court expressly found that racially polarized voting is not present in Ohio, because whites do not vote sufficiently as a group so as to prevent black voters from electing representatives of their choice. In light of that finding, appellees cannot satisfy the third *Gingles* precondition, and thus their Section 2 claim must be rejected. Moreover, the district court's finding of a Section 2 violation also fails under the first *Gingles* precondition, because the court erroneously assumed that Section 2 requires the creation of districts in which the minority group is demonstrably not a majority of the voting age population.

II. Claims under the Fifteenth Amendment require proof of discriminatory motivation. *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). The district court purported to find that appellants violated the Fifteenth Amendment in this case, but that finding cannot with-

stand scrutiny. The court justified its finding of discriminatory intent on the ground that appellants allegedly acted "for political advantage," J.S. App. 142a-143a, but evidence of *political* gerrymandering does not suffice to justify a finding of *racial* gerrymandering.

" 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *City of Mobile* v. *Bolden*, 446 U.S. 55, 72 n.17 (1980) (plurality opinion) (quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979)). In this case, the district court failed to identify any evidence supporting a finding of discriminatory purpose under that standard. Indeed, the court did not dispute the truthfulness of appellants' assertions that they understood the Voting Rights Act to require the creation of majority-minority districts. Under these circumstances, the district court's finding of discriminatory intent should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD'S CREATION OF MAJORITY-BLACK DISTRICTS RESULTED IN DILUTION OF BLACK VOTES IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

1. The district court clearly erred in suggesting that Section 2 of the Voting Rights Act automatically forbids creation of majority-minority districts in the absence of the equivalent of a judicial finding of a Section 2 violation. Nothing in the language of Section 2 or in the cases construing that provision supports such an interpretation, and the district court's holding to the contrary is simply without foundation.

The district court reasoned that the Voting Rights Act does not itself mandate the creation of majority-minority districts in the absence of a finding of a legal violation; as the court pointed out, "violations of the Voting Rights Act must be proven, not assumed, as a predicate for remedial action." J.S. App. 129a. That statement of the law is correct as far as it goes: Nothing in the Voting Rights Act requires state or local jurisdictions to maximize the number of majority-minority districts, or authorizes courts to require creation of such districts in the absence of a judicial finding of a legal violation.

But the fact that creation of majority-minority districts is not required by the Voting Rights Act provides no support for the conclusion that the Act *forbids* the States to achieve that goal. States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law, and nothing in the Act takes from the States their preexisting authority

to choose the particular policies and goals they wish to be reflected in their reapportionment plans. As long as those policies and goals do not conflict with the commands of federal law, the States are free to reapportion in whatever manner they see fit.

Similarly, the fact that *courts* may not require creation of majority-minority districts until a violation has been proven does not suggest that the *States* are subject to the same limitation under Section 2. The States have both the right and the responsibility to reapportion their own legislative districts in the first instance, and in doing so may well choose to implement policies that would be beyond the authority of the federal courts to achieve. See *Wise* v. *Lipscomb*, 437 U.S. 535, 539-541 (1978) (opinion of White, J.); *Connor* v. *Finch*, 431 U.S. 407, 414-415, 419-420 (1977). Absent a showing of an underlying legal violation, Section 2 grants the federal courts no authority to interfere with a State's reapportionment process or to require state officials to justify the goals they have chosen to achieve as part of that process.[5]

It is no doubt true that a State's creation of majority-minority districts could under some circumstances result in unlawful vote dilution in violation of Section 2, and in those circumstances a federal court would be both authorized and obligated to invalidate some or all of the apportionment scheme. But Section 2 provides no basis for invalidating a state redistricting plan merely because the State has chosen to create majority-minority districts; the invalidity of the plan under Section 2 must still be

---

[5] Of course, under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, covered jurisdictions must obtain administrative or judicial preclearance for changes in their election laws. The State of Ohio is not subject to the requirements of Section 5.

proven under the same standards applicable to all vote-dilution claims.

2. The district court's findings effectively rebutted the State's assertion that creation of majority-black districts was required to remedy an existing Section 2 violation. Those same findings, however, foreclosed the court's holding that the 1992 plan resulted in dilution of black votes in violation of Section 2. The district court's finding of a Section 2 violation cannot be sustained.

a. In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court established three threshold requirements applicable to a claim that the use of multimember districts has diluted the votes of minority group members in violation of Section 2. As a prerequisite to the maintenance of such a claim, a minority group must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a block to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 48-51.

Although *Gingles* involved a challenge to multimember districts, in our view the same preconditions apply to claims that the drawing of single-member districts results in dilution of minority votes.[6] Thus, plaintiffs who seek to invalidate a redistricting plan on the ground that it dilutes minority voting power in violation of Section 2 (either by "packing" minority voters into a few districts or by "fragmenting" geographically cohesive minorities among numerous districts) must prove, as part of their prima facie case,

---

[6] Our position in this regard is set forth in our brief *amicus curiae*, at 8-12, in *Growe* v. *Emison*, No. 91-1420. Copies of that brief have been provided to the parties in this case.

that the allegedly injured group could constitute a majority of the voting age population in a single-member district and that the relevant jurisdiction exhibits legally significant racially polarized voting. Appellees cannot meet that burden in this case.[7]

b. The district court repeatedly found that racial bloc voting is not present in Ohio.[8] J.S. App. 130a, 132a, 139a-140a. Given that "legally significant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice" (*id.* at 132a), appellees simply cannot succeed on their claim that the 1992 plan results in dilution of black voting power in violation of Section 2, because such racial bloc voting is a prerequisite to a vote-dilution claim. See *Sanchez* v. *Bond*, 875 F.2d 1488, 1494-1496 (10th Cir. 1989), cert. denied, 111 S. Ct. 340 (1990); *Overton* v. *City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989); see also *Thornburg* v. *Gingles*, 478 U.S. at 46 ("the results test does not assume the existence of racial bloc voting; plaintiffs must prove it"). Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Id.* at 49 n.15.

Moreover, the district court's finding of a Section 2 violation also failed to comply with the first *Gingles* precondition: The requirement that the allegedly in-

---

[7] Accordingly, this case does not present the question of what, if any, additional facts must be proven in order to establish a prima facie case of vote dilution in cases challenging the drawing of single-member districts.

[8] As noted above, note 4, *supra*, the district court exempted from this finding the two districts at issue in *Armour* v. *Ohio*. J.S. App. 132a.

jured group "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. Indeed, the legal theory accepted by the district court is directly at odds with the first *Gingles* precondition, because it assumes that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population. See J.S. App. 141a. We agree with those courts that have rejected such a notion.[9] Because the district court's findings establish that the *Gingles* preconditions are not present in this case, the court's holding that the 1992 plan results in minority vote dilution in violation of Section 2 must be reversed.

---

[9] See, *e.g.*, *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 942, 947 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989); *Latino Political Action Comm., Inc.* v. *City of Boston*, 784 F.2d 409, 412, 415 (1st Cir. 1986); *Skorepa* v. *City of Chula Vista*, 723 F. Supp. 1384, 1391-1392 (S.D. Cal. 1989); *Turner* v. *Arkansas*, 784 F. Supp. 553, 567-571 (E.D. Ark. 1991), aff'd, 112 S. Ct. 2296 (1992); *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634, 651-655 (N.D. Ill. 1991); see also *Brewer* v. *Ham*, 876 F.2d 448, 451 (5th Cir. 1989); *Ewing* v. *Monroe County*, 740 F. Supp. 417, 419 (N.D. Miss. 1990); *Jeffers* v. *Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989); *Gunn* v. *Chickasaw County*, 705 F. Supp. 315, 318 (N.D. Miss. 1989); *McDaniels* v. *Mehfoud*, 702 F. Supp. 588, 592 (E.D. Va. 1988); *Neal* v. *Coleburn*, 689 F. Supp. 1426, 1434-1435 (E.D. Va. 1988); *Gingles* v. *Edmisten*, 590 F. Supp. 345, 380-381 (E.D.N.C. 1984), aff'd in part and rev'd in part, *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). This Court's summary affirmance of *Turner* v. *Arkansas*, *supra*, provides further support for the rejection of the district court's holding in this case. The appellants in *Turner* sought review in this Court on the question whether so-called "influence" claims are cognizable under Section 2, and the Court summarily affirmed the district court's rejection of such claims. See Jurisdictional Statement at i, 1-2, in *Turner* v. *Arkansas*, No. 91-1615.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD'S CREATION OF MAJORITY-BLACK DISTRICTS VIOLATED THE FIFTEENTH AMENDMENT.

In its March 19, 1992, opinion, the court found that the apportionment board's redistricting plan was the product of "intentional dilution for political reasons," and was accordingly invalid under the Fifteenth Amendment. J.S. App. 143a. That finding was erroneous.[10]

"[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation."

---

[10] In *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980), the plurality suggested that no Fifteenth Amendment violation can be shown where the plaintiff group has been permitted to "register and vote without hindrance." Three justices disagreed with the plurality on that point, and two expressed no opinion on the subject, thus leaving the question open for future resolution. See *Rogers* v. *Lodge*, 458 U.S. 613, 619 n.6 (1982); see also *Beer* v. *United States*, 425 U.S. 130, 142 n.14 (1976) ("There is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment."). The lower courts are divided over the applicability of the Fifteenth Amendment to vote-dilution claims. Compare, *e.g.*, *Buchanan* v. *City of Jackson*, 708 F.2d 1066, 1069 (6th Cir. 1983); *McMillan* v. *Escambia County*, 638 F.2d 1239, 1243 n.9 (5th Cir.), cert. dismissed, 453 U.S. 946 (1981), vacated in part, 688 F.2d 960, 961 & n.2 (5th Cir. 1982); with, *e.g.*, *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1555 (11th Cir.), appeal dismissed, 469 U.S. 976 (1984); *Perkins* v. *City of West Helena*, 675 F.2d 201, 205-206 & n.6 (8th Cir.), aff'd, 459 U.S. 801 (1982); *Washington* v. *Finlay*, 664 F.2d 913, 919 & n.3 (4th Cir. 1981); *Lodge* v. *Buxton*, 639 F.2d 1358, 1372-1373 (5th Cir. 1981). Because the district court erred in finding the requisite discriminatory intent in this case, and because neither the court nor the parties addressed the scope of the Fifteenth Amendment below, there is no need for the Court to resolve the question at this time.

City of Mobile v. *Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion of Stewart, J.); see *id.* at 103 (White, J., dissenting). The district court failed to identify any legally sufficient basis for concluding that appellants adopted the 1992 plan for the purpose of discriminating against blacks. Thus, assuming the Fifteenth Amendment is applicable to vote-dilution claims, the district court's holding that appellants violated that provision cannot be sustained.[11]

The district court purported to find that the apportionment board's alleged fragmentation of minority areas was an act of intentional racial discrimination. The only explanation of the factual basis for that finding, however, came in the district court's March 19, 1992, order, in which the court explained that "the board cannot seriously contend that it did not apply its 'remedy' intentionally and for political advantage in violation of the Fifteenth Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination." J.S. App. 142a-143a.

---

[11] For the same reason, the district court's findings would not support invalidation of the 1992 plan on the ground that it constituted intentional discrimination against black voters in violation of Section 2 of the Voting Rights Act or the Equal Protection Clause of the Fourteenth Amendment. Cf. *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990) (holding that, in a Section 2 case, the requirement that the minority group be sufficiently numerous and compact to constitute a majority of a single-member district may be relaxed where intentional racial discrimination has been shown), cert. denied, 111 S. Ct. 681 (1991). The district court did not rely on the Equal Protection Clause in invalidating the 1992 plan as racially discriminatory, presumably because appellees failed to assert such a claim under the Fourteenth Amendment in their complaint.

In our view, that statement is not sufficient to sustain appellees' claim that concentrations of minority voters were intentionally and discriminatorily divided in order to reduce their political clout. The court appears to have held that the board's decision to create majority-minority districts was intended to further political interests, and proceeded from that finding to the conclusion that appellants acted with racially discriminatory intent in so doing. But evidence of attempted political gerrymandering does not suffice to make out a claim of *racial* gerrymandering; it need hardly be said that racial gerrymandering requires specific intent to discriminate against a particular *racial* group.

To make out a racial vote-dilution claim, plaintiffs must show that the challenged districting scheme was in fact intended to harm voters of a particular racial or ethnic group, and was intended to do so because they are members of that group. Thus, here the court would have to have found that the 1992 plan's district lines were chosen *because* they would have a fragmenting effect on black voters. " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *City of Mobile* v. *Bolden*, 446 U.S. 55, 72 n.17 (1980) (plurality opinion) (quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979)).

Absent from the district court's decisions is any mention of evidence tending to show that the 1992 plan was devised for the purpose of dividing black voting areas, or that the apportionment board's intention was to reduce the political clout of the people in

those areas because they were black. To the contrary, the only evidence discussed by the district court concerning the apportionment board's intentions toward black voters indicates that the board majority and Tilling sought to *avoid* diluting black voting power by creating majority-black districts, and that they did so because they believed the Voting Rights Act required that result. J.S. App. 6a-14a, 130a, 134a & n.4, 142a; see also J.A. 21-22, 80, 82-83, 232-233, 272, 279-285. Indeed, while the district court emphatically rejected the suggestion that the Voting Rights Act required the apportionment board to create majority-black districts, the court did not dispute that appellants acted in the good-faith, though mistaken, belief that their actions were required by federal law.[12] Accordingly, the district court's finding of discriminatory intent is unsubstantiated, and should be reversed.

---

[12] The district court's finding of discriminatory intent is further undercut by the fact that the board's reapportionment plan was devised only after extensive consultation with representatives of the NAACP and the Black Elected Democrats of Ohio (BEDO), and in fact incorporated extensive suggestions made by those and other minority organizations. J.S. App. 71a-77a, 80a-81a, 164a-167a, 269a-270a. BEDO endorsed portions of the plan, and the NAACP endorsed the plan as a whole. *Ibid.*; *id.* at 117a.

CONCLUSION

The district court's findings that appellants violated Section 2 and the Fifteenth Amendment should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN R. DUNNE
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

JAMES P. TURNER
Deputy Assistant Attorney General

THOMAS G. HUNGAR
Assistant to the Solicitor General

DAVID K. FLYNN
MARK L. GROSS
Attorneys

JULY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45530